IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 850 of 1998
with
CRIMINAL APPEAL No. 860 of 1998

For Approval and Signature:

HONOURABLE MR.JUSTICE R.P.DHOLAKIA

HONOURABLE MS.JUSTICE H.N.DEVANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge?

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HASMUKH SHIVABHAI PANDYA - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :

Criminal Appeal No.850 of 1998

Mr.Sunil Mehta for Mr.S.K.Bukhari for the appellant
Ms.M.L.Shah, learned APP for the respondent-State

Criminal Appeal No.860 of 1998

Ms.M.L.Shah, learned APP for the appellant-State
Mr.Ekant Ahuja for Mr.A.D.Shah for the respondents 1-4

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CORAM : HONOURABLE MR.JUSTICE R.P.DHOLAKIA

and

HONOURABLE MS.JUSTICE H.N.DEVANI

Date :25/04/2007 & 26/04/2007

COMMON ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE R.P.DHOLAKIA)

1. Criminal Appeal No.850 of 1998 under Sec.374 of the Code of Criminal Procedure ('the Code' for short) has been filed by the appellant-original accused No.1 against his conviction on being charged and tried for the offences punishable under Sections 302 and 114 of IP Code and Section 135 of BP Act and sentencing him to suffer RI for life and to pay fine of Rs.1,000/-, in default, to suffer SI for further 30 days while Criminal Appeal No.860 of 1998 has been filed by the appellant-State under Sec.378 of the Code against the acquittal of respondents-original accused Nos.2 to 5, vide judgment and order dated 23-7-1998 delivered by the learned Addl. Sessions Judge, Bharuch, in Sessions Case No.181 of 1997.

2. As both the appeals have arisen from the same judgment and order dated 23-7-1998 passed in Sessions Case No.181 of 1997 by the learned Addl. Sessions Judge, Bharuch, they were heard together and are being decided by this common judgment.

3. Short facts of the case of the prosecution is that on 30-5-1997 there was a marriage of one Kalpesh Chiman Shrimali, a resident of Chauhan Society, Baroda, and, therefore, victim and others being friends of Kalpesh

had gone to attend the said marriage from Baroda to Amod in a specially arranged luxury bus. They reached Amod at about 10.00 p.m. Some people had gone to the marriage place while some had gone to the guest house. As one of the friends, Narendra Jethalal Makwana, had not taken his dinner, the complainant had taken him to the marriage place and requested the person standing there to provide dinner to Narendra. However, it was refused on the ground of dinner time having over and, therefore, some altercations had taken place and during the scuffle, yantra(amulet) of the complainant has been lost and some minor injuries were caused. Thereafter, both the persons left the place and at about 1.00 a.m. on 31-5-1997, the complainant and his friend Bharat had gone to the same place in search of amulet lost during last night. At that time, people gathered there started beating them with iron chairs, dish, etc. and during that time, one person came running with knife and gave knife blows to Bharatbhai as a result of that, Bharatbhai received severe injuries and hence, the complainant and Bharatbhai started running towards the luxury bus parked very near to the highway and when they reached very near to the bus, Bharatbhai fell down and thereafter, he was taken to Amod hospital

by the complainant in the said luxury bus. On examination of Bharat at the hospital, the doctor declared him dead. As far as the complainant is concerned, doctor examined and treated him. Thereafter, the complainant narrated the incident before PSI, Shri Jani of Amod Police Station and in pursuance of that, his complaint has been recorded by PSI, Shri Jani and it has been registered as Amod Police Station C.R.No.I-36 of 1987 for the offence punishable under Secs.302 and 114 of IPC and Sec.135 of B.P.Act. After registration of the offence by PSO, Amod Police Station, he made arrangements for inquest panchnama and post mortem of the dead body and handed over investigation to PSI, Shri Jani. In pursuance of that, PSI, Shri Jani investigated the matter further and went to the place of scene of offence i.e. Ganesh Society and prepared panchnama of scene of offence in presence of panchas and recorded statements of various witnesses. He also tried to search the accused. As the accused persons came to the Police Station, they were interrogated and later on they were arrested. He sent the accused Hasmukh with police yadi to Amod Police Station for treatment. As one of the accused showed willingness to produce the weapon alleged to have been used in the commission of offence, by way of drawing

panchnama under Sec.27 of the Indian Evidence Act, same has been seized by I.O. He also collected the injury certificate of the complainant as well as of the accused and also kept the same in file along with inquest panchnama as well as post mortem report. He also sent required muddamal into FSL with forwarding letter and on receiving the report, it has been kept in investigation file. At the end of investigation, charge sheet has been submitted into the Court of learned Chief Judicial Magistrate, Amod, against the accused.

4.As the offences alleged against the accused were exclusively triable by Court of Sessions, learned Judicial Magistrate (First Class), Amod, committed the case to the Court of Sessions at Bharuch and it was numbered as Sessions Case No.181 of 1997 and transferred to the Court of learned Addl. Sessions Judge for disposing of the same on merits. Learned Addl. Sessions Judge framed charge against the accused. The charge was read over and explained to the accused. As the accused pleaded not guilty to the charge and prayed for trial, to prove the charge against the accused, the prosecution examined the following witnesses:

1)P.W.1, Ashishbhai Thakorebhai Waghela, Exh.15, the complainant,

2) P.W.2, Narendrabhai Jethalal Makwana, Exh.16,
3) P.W.3, Ronakbhai Vinodbhai, Exh.17,
4) P.W.4, Chimanbhai Punjabhai, Exh.18,
5) P.W.5, Dipakbhai Yashwantrai Patil, Exh.19,
6) P.W.6, Narendrabhai Chimanbhai Parmar, Exh.20,
7) P.W.7, Salimbhai Murtuja Siddique, Exh.21,
8) P.W.8, Karsanbhai Chandubhai, Exh.25,
9) P.W.9, Dr.Iqbalbhai Yusufbhai, Exh.26, Medical Officer, Amod Community Health Centre, who examined and treated the complainant and the accused Hasmukhbhai and performed post-mortem on the dead body of deceased Bharatbhai and also informed police by way of vardhy,
10) P.W.10, Vaghjibhai Madhavsinh, Exh.31,
11) P.W.11, Vasutbhai Chhagubhai, Exh.35,
12) P.W.12, Yunusbhai Ibrahimbhai Exh.36 and
13) P.W.13, Narendrakumar Babulal Jani, Exh.37, Investigating Officer.

The prosecution also placed reliance upon following documentary evidence:-

i) Complaint Exh.38,
ii) inquest panchnama Exh.12,
iii) panchnama of scene of offence, Exh.22,
iv) panchnama of seizure of clothes of the deceased Exh.13,
v) panchnama of physical condition of the accused Hasmukh Exh.14,

vi)Post mortem note Exh.27,

vii)Map of scene of offence Exh.32,

viii)Injury certificate of accused No.1 Hasmukh Exh.29,

ix)Discovery panchnama of knife Exh.23,

x)Yadi for certificate as well as for treatment of accused sent to Medical Officer by I.O., Exh.40,

xi)Yadi from Police Officer to Medical Officer Exh.41,

xii)Letter written by I.O. to Medical Officer for changing the name of the complainant, Exh.42,

xiii)Receipt given by father of deceased for taking custody of dead body of victim, Exh.43,

xiv)FSL receipt Exh.44 and

xv)FSL report Exh.45.

5. On submission of closing purshis by the prosecution, learned Addl. Sessions Judge, Bharuch, recorded further statement of the accused under Sec.313 of Cr.P.C. and asked incriminating questions to the accused. Thereafter, after hearing the learned counsel appearing for the respective parties, learned Addl. Sessions Judge delivered the aforesaid judgment and order which is giving rise to the present appeals.

6. We have heard learned counsel, Mr.Sunil Mehta for Mr.S.K.Bukhari for the appellant of

Criminal Appeal No.850 of 1998, learned APP, Ms.M.L.Shah for the respondent-State of Criminal Appeal No.850 of 1998 as well as for the appellant-State of Criminal Appeal No.860 of 1998 and learned counsel Mr.Ekant Ahuja for Mr.A.D.Shah for the respondents-original accused Nos.1 to 4 of Criminal Appeal No.860 of 1998. Learned counsel for the appellant has relied upon the following reported judgments of the Apex Court:

i) Samghaji Hariba Patil Vs. State of Karnataka, (2007)1 Supreme Court Cases (Cri) 113;

ii) Kanan and Others Vs. State of Kerala, AIR 1979 Supreme Court 1127;

iii) Mohanlal Gangaram Gehani Vs. State of Maharashtra, AIR 1982 Supreme Court 839;

iv) Mohd. Abdul Hafeez Vs. State of Andhra Pradesh, AIR 1983 Supreme Court 367;

v) Salim Sahab Vs. State of M.P., (2007)1 Supreme Court Cases 699;

vi) Pappu Vs. State of M.P., (2006)7 Supreme Court Cases 391;

vii) Manke Ram Vs. State of Haryana, 2003 AIR SCW 2141 and

viii) Hem Raj and others Vs. State of Haryana, AIR 2005 Supreme Court 2110.

7. Before proceeding with the matter, certain portion of the evidence of witnesses relevant for deciding these appeals are reproduced hereinbelow:

7.1 P.W.1, Ashish Thakorebhai, Exh.15, has deposed in his examination-in-chief that the marriage party had reached Amod at about 10 O'clock at night. They were given accommodation at the guest house near Ganesh Society. He and his friends had dinner together, with the second batch of diners. At that time, Narendra Jetha Makwana had been left out. Upon asking Narendra, he said that he was yet to have his dinner. It was approximately 12 O'clock at night. He has further deposed that he and Narendra went to the place where the dishes were kept and asked the person there to serve dinner. However, the said person said that dinner was over and started pushing them. In the scuffle, the yantra (amulet) that he was wearing around his neck broke. One youth hit him with a dish therefore he came outside. After coming outside he told that his yantra was lost and he and his friend Bharat went to the place where the scuffle had taken place. When they went there, two persons hit him on the head with a chair and hit Bharat with a dish. At that time, a youth who had a knife in his hand came there and inflicted a knife blow on the left side of Bharat's chest. The said youth was dark, had thick moustaches and was also physically fat. Thereafter, he and Bharat came running outside. Both came in a

luxury bus to Amod Hospital where the doctor pronounced that he was dead. He has further deposed that the doctor had treated him. Jani Saheb, Officer from the Police Department, had come to the hospital, thereafter he had gone to the Police Station with him. He had given his complaint at the Police Station. He has deposed that he knows the accused and identified accused Hasmukh, Indravadan and Dalsukh by name in the Court. He has also identified two other accused but stated that he did not know their names.

In his cross-examination, he has admitted that he had taken treatment from a doctor at Amod and that he had gone directly to the doctor. He has further stated that the doctor had asked as to who had assaulted him whereupon he had informed the doctor that unknown persons had assaulted him. He has categorically admitted that he had not gone to the Police Station to inform but his friends had gone. He has admitted that five of his friends had gone out of which, he knew that Narendra, Narendra Parmar and Deepak Patil had gone to the Police Station. He has stated that these three people informed the police and, therefore, the Police Officers had come to the hospital. From the hospital he had gone with the Police Officer to the Police Station to lodge his complaint. He has

categorically admitted that his friends had not come to the Police Station after he had gone to the Police Station to give his complaint.

Ashish has further admitted in his cross-examination that he had never come to Amod prior to the incident and that prior to the incident, he had not seen the accused. He has admitted that there was no identification parade before the Executive Magistrate. He has categorically admitted that in his complaint he has not given the name of the assailants but only given their description. He has further admitted in his cross-examination that Bharat was bleeding heavily on account of the injuries and that he ran ahead and Bharat was running behind him. He has also stated that blood was dripping because of the injuries sustained by Bharat.

He has further admitted that he had shown the scene of offence after giving his complaint.

In his cross-examination, he has further admitted that Bharat had come upto the bus and upon his falling down there, he was lifted and taken inside the bus. He has categorically admitted that no blood had fallen on the ground near the bus and that his clothes had not been stained by the blood.

He has also admitted in his cross-examination that it had taken five to ten minutes to reach the hospital in the luxury bus and that after reaching the hospital, he had remained there for 45 minutes. He has further admitted that the incident involving knife blow had occurred at 1 O'clock at night and that he was not sure of the exact time when the complaint was lodged but he was sure that it was already dawn. He has further admitted that PSI, Jani, had come within half an hour of their reaching the hospital and that he was conscious at that time. He has admitted that he had not narrated the details to PSI, Jani at the hospital. He has fairly admitted that as there were no elders at the hospital, he had not given the complaint and that he was waiting for them. He has also admitted that his elders had come to the hospital before the PSI.

7.2 Dr.Iqbalbhai Yusufbhai, P.W.9, Exh.26 has deposed that he had received the dead body of Bharatbhai along with yadi for conducting post-mortem at 11 a.m. and carried out the post-mortem at 2 O'clock in the afternoon. He has further deposed that he has found and noted 5 external injuries in column No.17 of the post-mortem report and that injuries number 2 to 4 had corresponding internal injuries. He has also deposed that

the muddamal knife can cause the injuries noted in column NO.17 and he has proved post mortem report as Exh.27.

He has further deposed that on 31-5-1997 between 12.30 and 1.00 at night he had examined Ashishbhai Waghela and noted three injuries.

In his cross-examination, he has admitted that Ashish had directly come to him for treatment and had given history to the effect that unknown persons has assaulted him with steel plates and steel chairs and caused injuries. He has also admitted that first Ashish had come for treatment thereafter 20 to 21 persons had come and informed him that one patient had sustained grievous injuries and his condition was serious. Upon his examining that person it is found that he had expired. Therefore, he had asked them to go to the Police Station and inform them. After these people informed the Police, the Police had come to the Police Station. Thereafter, he had received the dead body for post mortem at 11 a.m.

In his examination-in-chief, Dr.Iqbal has deposed that he had examined Hasmukhbhai Shivabhai Pandya at 6 O'clock in the evening and upon examining him, he had noted three injuries.

In his cross-examination, he has admitted

that Hasmukh had been brought with a police yadi but he had not brought the same with him to the Court. He has further admitted that Hasmukh had stated in his history that some unknown persons had assaulted him with knife. He has fairly admitted that age of injury can be decided on the basis of colour of the skin but fairly admitted that he has not noted down colour of injuries in his case papers or the certificate Exh.29.

7.3 P.W.11, Vasutbhai Chagubhai, PSO, Amod Police Station, Exh.35, has deposed that the complaint which has been recorded by PSI, Jani at 3 O'clock in the morning had been handed over to him for registration. The complainant was Ashishbhai Thakorebhai Waghela. Upon receipt of complaint, he had registered the same as I.C.R.No.36 of 1997 for the offences under Sections 302/114 of IPC and Section 135 of B.P.Act and after making endorsement, same has been handed over to Shri Jani for further investigation.

In his cross-examination, he has categorically admitted that before 3.00 a.m., this offence had not been registered and that nobody had come to report about the incident before 3 O'clock. He has further admitted that at that time, he was alone at the Police Station.

7.4 P.W.13, Narendrakumar Jani, the

Investigating Officer, Exh.37, has deposed in examination-in-chief that he was on highway patrolling night duty on 30-5-97. On 31-5-97 while returning from patrolling to Amod, at about 1.30 at night upon coming near Amod, on the highway road between the Rest House and Ashapuri Saw Mill, there was a wedding at Ganeshnagar and a lot of people were suddenly coming to and fro, at that time, upon inquiry it was learnt that a quarrel had taken place at the wedding at Ganeshnagar and people had come to lodge a complaint wherein one person has been injured. Whereupon they went to the Government Hospital at Amod and upon inquiry, Ashishbhai Thakorebhai had informed that they had come for the marriage from Vadodara to Amod and that there was a quarrel regarding dinner at night and four to five persons from the kitchen had assaulted Kalpesh Chimanlal Shrimali and upon being given knife blows, he was brought to the hospital for treatment and the doctor on duty had upon examining him declared him dead. Therefore, he had carried out inquest of the dead body of the deceased and filled up Marnotar Form and handed over the dead body to the local doctor for post-mortem and recorded Ashishbhai's complaint at the hospital wherein along with description, he had named five accused. The complaint was

sent to the Police Station for registration.

In his cross-examination, he has admitted that having noticed the commotion at Ganeshnagar, he had gone to the Police Station. At that time, some persons had come to give complaint who were other persons and had only come to inform. He has admitted that he does not know the names of the persons who had come but had written down the name of one Narendra. Narendra had told that there was a fight and the patient is in the hospital. At that time, Narendra had not given any names but he had only named those who were injured. A person named Kalpesh had been injured he had given his name. At that time, Vasant Chabu was the PSO. No entry was made at the police chowky regarding going to the hospital. The offence was registered at night namely early in the morning at 3 O'clock. Ashish had given his complaint at 2.45 at night. Thereafter, the complaint was sent for registration and immediately inquiry was made regarding the registration number of the complaint. Inquest panchnama was drawn after receiving the number. In his cross-examination, he has admitted that the complaint was recorded after drawing the inquest panchnama and that the complaint had not been registered before drawing the inquest panchnama. In his cross examination,

he has explained that at the time of drawing inquest panchnama, he had taken the number and that he had taken the number before recording the complaint. He has admitted that the inquest panchnama was completed at 1.30 a.m. but he is not in a position to say as to when he had obtained the number. He has admitted that he has not sent the case diary to the Court. He has further admitted in his cross-examination that during the course of investigation, it was revealed that the complainant and the witnesses had come to Amod for the first time. He has also categorically admitted that in this case, Test Identification Parade has not been carried out.

8. We now will deal with the contentions raised by the learned counsel for the respective parties one by one more particularly the contentions raised by the learned counsel, Mr.Sunil Mehta for the appellant-accused of Criminal Appeal No.850 of 1998. We have gone through the judgments relied on by the learned counsel. Keeping in mind the principles laid down by the Apex Court in those reported judgments, we proceed further.

26-4-2007

9. It is submitted by the learned counsel Mr.Mehta that the appellant-accused of Criminal Appeal No.850 of 1998 has been

lodged in jail since the year 1998. The first contention raised by him after taking us through the findings arrived at by the court below in paragraphs 10, 11 and 12 of the judgment and also through the evidence on record is that, in the first incident, the complainant and his friend Narendra were present while in the second incident i.e. the incident in question, except the complainant and his friend-deceased Bharat, no other persons were present from the side of the accused. He has also taken us through the evidence of Narendrabhai J.Makwana, Exh.16, Ronakbhai Vinodbhai, Exh.17, Dipakbhai Yashwantrai Patil, Exh.19 and Narendrabhai Chimanbhai Parmar, Exh.20 and contended that though these witnesses have been examined by the prosecution as eye witnesses or witnesses of incident, it has come out in their cross examination that they are not witnesses of incident nor were they present at the time of incident and, therefore, court below has not believed them as eye witnesses. The complainant and Bharat both were present at the time of second incident in which Bharat succumbed to the injuries and, therefore, according to him, the entire case of the prosecution is based only upon the evidence of complainant.

10.We have gone through the evidence shown to

us by the learned counsel for the respective parties more particularly the evidence Exhs.16, 17, 18, 19, 20 and 38 and also the evidence Exh.15 of complainant, Ashishbhai Thakorebhai, P.W.1 and we fully agree with the findings arrived at by the court below that all the above referred witnesses were not present at the time of incident but at the time of the first incident, complainant and Narendra were present and in the second incident, i.e. the incident in question, the complainant and Bharat were only present. Even the say of the prosecution is on the same line and, therefore, though the above referred persons stated to be there at the time of incident, it can however be said that they were there for attending the marriage. Except this, there are no other evidence established from the case of the prosecution to prove that these witnesses were there at the time of incident or that they are the witnesses of incident and, therefore, case of the prosecution is required to be evaluated only on the basis of evidence of the complainant i.e. P.W.1, Ashishbhai Thakorebhai Waghela, Exh.15. If prosecution is able to prove that his evidence is true, trustworthy and free from all doubts then, conviction can certainly be sustained relying on his evidence without any corroboration.

11. Keeping in mind the above aspects, we have evaluated the complaint Exh.38 as well as oral evidence of the complainant Exh.15 thoroughly. Since relevant evidence of the important witnesses have been reproduced by us hereinabove in the judgment, we are not repeating or reproducing the same again but we are discussing the same keeping in mind the evidence on record.

12. It is established that the first incident of a minor scuffle regarding dinner has taken place at about 12 O'clock at night. Evidence on record shows that thereafter both, i.e. complainant and Narendrabhai left the premises. According to the complainant, since his yantra (amulet) has been lost in the scuffle, he and his friend-victim Bharat again went there. When they were searching for the same, some scuffle took place and people gathered there. At that time, one person, whose name he does not know, had come along with knife and given knife blow on the left side chest of Bharat and even the complainant also received injuries and, therefore, he and Bharat started running towards the luxury bus parked very near to the highway. He has further deposed that when they reached very near to the bus, Bharat fell down and, thereafter, he took Bharat into the luxury bus to Amod Hospital where on

examination doctor declared him dead and the complainant has been treated by the doctor. According to him, thereafter, PSI, Mr.Jani of Amod Police Station came there to the hospital. Thereafter, he went along with him to the Police Station wherein he has given the complaint and same has been recorded at dawn.

13. In this regard, we may compare and evaluate the evidence of complainant with that of Dr.Iqbalbhai Yusufbhai, Exh.26, who was discharging his duty as a Medical Officer at Amod Community Health Centre at the relevant time and whose evidence has been reproduced hereinabove. It has been categorically admitted by Dr.Iqbalbhai in cross-examination that when he was discharging his duty in the hospital, the complainant Ashish came there. He examined and treated Ashish and also recorded history given by him wherein he has categorically stated that some unknown persons had assaulted him with dish and iron chair. Except that, he had not stated anything about the injuries sustained by deceased Bharat. It has also been admitted by doctor that after some time, 15-20 persons came there along with a seriously injured person and at that time also, they have given history and informed the doctor that they have come to Amod in a Maruti vehicle and

during quarrel, that person has received injury and, therefore, doctor has examined and declared him dead.

14. It has been established from the above that the evidence of complainant, Ashish as well as Dr.Iqbal contradicts the theory of the prosecution or the evidence of complainant that he took the deceased Bharat in luxury bus to Amod Hospital and it rather appears to be untrue and incorrect. It is established that first Ashish alone went to the hospital for his own injuries and later on other 15-20 persons went there along with the victim. This means that on material point the complainant is hiding something. When a suggestion has been put to him in his cross examination that he had a relation with the sister of victim Bharat and as a result of that scuffle has been taken place wherein Bharat has been killed by him, he has denied the said suggestion. However, facts remain that his version in the complaint as well as before the Court is running contrary to each other and it creates doubt mainly because of evidence of Dr.Iqbalbhai. It is by way of his evidence, the evidence of the complainant has been negatived as he being an independent person discharging duty as a Medical Officer in Amod Community Health Centre having no personal interest in the matter. We therefore

give more weight to the evidence of doctor than the evidence of the complainant.

15. Second contention raised by the learned counsel for the accused into the court below as well as this Court is regarding the FIR Exh.38. We have heard the learned counsel for the respective parties on that line.

16. It is established from the evidence of PSI, Vasutbhai Chhagubhai, P.W.11, Exh.35, that incident is alleged to have taken place at 1.00 a.m. while the complaint in question has been admittedly registered at 3.00 a.m. He has categorically admitted in his cross examination that prior to 3.00 a.m., nobody informed the Police Station regarding the incident in question and since he himself was alone in the Police Station till he registered the complaint, question of somebody else informing the Police Station about the incident in question does not arise. The possibility of somebody else informing the Police Station when he was in hospital also can be ruled out. Not only that, whether the complaint has been registered or not itself is a question in view of evidence of complainant, Ashish Exh.15. It has been categorically deposed by Ashish that he went to Police Station along with PSI, Jani wherein his complaint has been recorded by PSI, Jani. However, it has been

deposed in examination-in-chief by PSI, Jani, P.W.13, Exh.37, who is the Investigating Officer in this case, that he went to the hospital and recorded the complaint of the complainant at Amod Hospital itself wherein he has narrated the names of 5 persons with their description. Thereafter, he has sent the complaint along with his report to Amod Police Station for registering the same. There are two versions on record one, as per the complainant, he went to the Police Station for registering the offence and same has been recorded by PSI, Jani at Amod Police Station while PSI, Jani has categorically deposed in his chief examination contrary to the evidence of complainant on this point.

17. The other aspects which are required to be dealt with by this Court are regarding the names of assailants and their description in the FIR Exh.39.

18. We have minutely gone into the FIR. Beginning of the FIR shows that the complainant is unknown about the assailants. The complainant has admitted in his cross-examination that prior to the incident in question, he had never visited Amod. He has also admitted that otherside, i.e. accused and the relatives of the bridegroom, are not their relatives nor are they from the same Village. He has also admitted that he did

not name the assailants. Though the FIR starts with the description of the assailants without their names but before conclusion of the FIR, 5 persons have been mentioned with their respective roles. There are startling cross-examination on this point by the learned counsel for the accused into the court below to various witnesses namely, all the five alleged eye witnesses and the complainant as well as I.O., PSI, Jani and it has been established that accused have been apprehended by the police at about 1.30 or 2.00 a.m. and were in the Police Station. Moreover, it has been admitted by the complainant in his cross-examination that prior to the incident, he had never seen the assailants nor was he knowing the names of the assailants nor had he visited Amod. The complainant has categorically deposed that since he was not knowing the names of assailants, he has given description of only one person.

19. Other evidence established during the course of examination reveals that names mentioned in the last paragraph of the FIR have been on the basis of information given by a friend who visited the Police Station and hence, same has been dealt with by the court below in the same spirit in paragraph 22 of the judgment. As stated above, even accused were

also apprehended before recording the FIR but, for the reasons best known, they first recorded the FIR on the assumption of not knowing the names of the assailants but when description of one person has been given, they have narrated the act of individual assailants with their names leaving a room of doubt for all concerned as well as the Court as to the veracity of said narration.

20. In view of the above, it can be said that though the complaint has been recorded and registered at 3.00 a.m., description of assailants could only have been given in the FIR. Narration of names of five assailants before conclusion of the FIR with their individual act also creates doubt in the mind of the Court.

21. Evidence on record of Dr.Iqbalbhai Yusufbhai shows that he had sent written intimation to Amod Police Station about the incident in question at about 1-1.30 a.m. and there is no reason to disbelieve the same. If his evidence is accepted in its entirety then, it can be inferred that police is hiding something on relevant point. We therefore would like to believe that police had an information regarding the incident in question even prior to registration of FIR but they have not disclosed the same.

22. We have gone through the inquest panchnama

as well as Marnotar Form. Inquest panchnama has been prepared admittedly between 2.00 and 2.30 a.m. mentioning Crime Register number. This means that without making any entry in the Station Diary, he has started everything along with Crime Register number speaks volume. Even the complainant has also admitted that the complaint has been given by him after arrival of his elder family member. We are not saying much about the same. However, explanation given by PSI, Jani in that regard in his evidence is unsatisfactory and unacceptable. In short, it can be said that since the incident is alleged to have taken place at 1.00 a.m., doctor has informed the police in time. Even if the record showed that somebody else has informed the police, then also, same has not been registered till morning and first it has been started on the basis of description of one person, thereafter, names of five persons have been included into the offence in question. Not only that, discovery panchnama also creates doubt in the mind of the court mainly on the ground that as per the prosecution, appellant-original accused No.1 is the assailant but discovery panchnama has been drawn at the instance of one Indravadan. Panchnama of scene of offence Exh.22 also raises doubt regarding act of the

prosecution. Though it has come on record that injuries received by the victim are serious and that he was bleeding profusely, no blood stain marks have been found at the place of incident. As per the deposition of the complainant, the complainant and the victim Bharat went upto the luxury bus which was parked very near to the highway where the injured fell down. However, no blood stain marks were found there also. The complainant also deposed that he took the victim to the hospital in the luxury bus but no blood stain marks have been found on the floor of the said luxury bus also. Moreover, on the clothes alleged to have been worn by the complainant at the time when he took the injured to Amod Hospital, no blood stain marks were found.

23. In view of the aforesaid, the story put forward by the complainant cannot be believed in view of contradictory evidence appearing on record apart from the circumstantial and documentary evidence showing absence of blood stains marks either on the clothes worn by the complainant, at the scene of offence, very near to the scene of offence or in the luxury bus.

24. It is required to be noted that the whole base of the complaint is based on the description of a person and hence, if it

appeared to the prosecution that nobody knew names of assailants, but when the assailants were arrested, it was in the interest of all concerned including the prosecution to have held a test identification parade more particularly when the say of the complainant was that prior to the incident, he had never visited Amod and had not even seen the assailants prior to the time of incident. Non-holding of test identification parade also creates doubt in the mind of the Court.

25.It is also required to be noted that the appellant-accused Hasmukh had been sent to hospital within 18 hours of his arrest with police yadi where he has been treated by the doctor and certificate to that effect has been issued. The doctor has fairly admitted in his cross-examination that the injuries alleged to have been received by Hasmukh must have been received before 18 hours. He has fairly admitted that age of injury can be decided on the basis of colour of the skin but he has not noted down colour of injuries in his case papers of Hasmukh or the injury certificate Exh.29. Moreover, prosecution could not explain the injuries sustained by Hasmukh though duty bound and court below has also not dealt with the same properly on the ground of they being minor injuries. On going through the evidence in this regard, we are

unable to accept the findings given by the court below.

26. It is required to be noted that all the alleged eye witnesses including the complainant have identified the accused into the Court at the time of recording their evidence. They have admitted that they have never seen the assailants prior to the incident and they were not knowing them and as per their own admission, prior to recording their evidence, they had no opportunity to see them. Still, however, they went upto the extent of saying that incident has been taken place. The complainant even went upto the extent of identifying the persons with names. This also creates doubt regarding their evidence.

27. Looking to the entirety of the facts and circumstances narrated hereinabove, though the incident in question is alleged to have taken place in which a young man has lost his life as narrated by the prosecution, the accused-Hasmukh could not be connected with the crime in question in view of series of lacunae appearing on record, creating serious doubt in the mind of the Court. When a serious doubt has been created, benefit would accrue to the accused instead of the prosecution. It is required to be noted that certain evidence have come out in the cross-

examination of other witnesses which have not been accepted by the court below as they are not of the eye witnesses. Even court below has dealt with the same in detail in its judgment observing that they are not the witnesses of incident. They were not the persons present at the time of first or second incident. If it is so, then on that basis, other persons cannot be involved into the crime in question. However, their evidence can be used in favour of the accused. Thus, we are of the opinion that there is no satisfactory evidence to connect the accused with the crime in question and hence, appeal filed by the appellant-original accused No.1-Hasmukh Shivabhai Pandya is required to be allowed and the appeal filed by the State is required to be dismissed.

28. Criminal Appeal No.850 of 1998 is allowed. Judgment and order of conviction and sentence dated 23-7-1998 delivered by the learned Addl. Sessions Judge, Bharuch, in Sessions Case No.181 of 1997 are quashed and set aside qua the appellant-original accused No.1-Hasmukh Shivabhai Pandya. He is ordered to be set at liberty forthwith, if not required in any other offence.

Criminal Appeal No.860 of 1998 filed by the State is dismissed.

29. Office shall place a copy of this judgment

in each appeal.

(R.P.DHOLAKIA,J.)

(HARSHA DEVANI,J.)

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